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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-343

DISTRICT 153 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD AND
FIBERFIL DIVISION OF DART INDUSTRIES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

District 153 of the International Association of Machinists and Aerospace Workers, AFL-CIO (the Union), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on April 24, 1975 (*infra,* p. 1a).

OPINIONS BELOW

The judgment of the Court of Appeals (Circuit Judges Tamm and MacKinnon and Senior District Judge Jameson), was rendered without opinion. The 2-1 decision of the National Labor Relations Board, adopting without comment the decision of its Administrative Law Judge on the question presented here,[1] is reported at 210 NLRB No. 163 (*infra*, pp. 4a- 37a). The majority and dissenting opinions in the Board's 3-2 decision in *G. T. E. Lenkurt, Incorporated*, 204 NLRB 921-923 (1973) (hereinafter cited *Lenkurt*), which the Administrative Law Judge here followed,[2] are reprinted *infra*, pp. 38a-45a.

JURISDICTION

The judgment of the Court of Appeals was entered on April 24, 1975 (*infra*, p. 1a). The Union's timely petition for rehearing and its suggestion for rehearing *en banc*[3] were denied on June 19, 1975 (*infra*, pp. 2a-3a). The jurisdiction of this Court rests on 28 U.S.C. § 1254(a).

QUESTION PRESENTED

Whether an employer violates employee self-organizational rights guaranteed by Section 7 of the National Labor Relations Act by prohibiting employees who are

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[1] Review is not sought of that portion of the Board's 2-1 decision holding that the discharge of employee Grubb was nondiscriminatory (*infra*, pp. 5a-37a). In this petition, "A" references are to the appendix below; "—a." references are to the appendix to this Petition.

[2] Member Fanning dissented for the reasons stated in his "dissent in * * * *Lenkurt* * * *" (*infra*, p. 17a, n. 20).

[3] The Union filed motions for extension of time to file that petition and suggestion on May 7 and 8, 1975, and filed its petition and suggestion on May 22, 1975.

off-duty from distributing Union organizing literature to fellow employees and talking to them about the Union on plant parking lots at shift change time.

STATUTE INVOLVED

Section 7 of the National Labor Relations Act (29 U.S.C. § 151) accords employees *inter alia* "the right to self-organization, [and] to form, join, or assist labor organizations . . . ". Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."

STATEMENT

THE OPERATIVE FACTS

The uncontested facts are as follows:

Fiberfil Manufacturing Company (the Company) is engaged in the manufacture, sale and distribution of plastics and related products in Evansville, Indiana. It there operates two plants, approximately 4½ miles apart. One is called the Northbrook plant and the other Plant No. 1. (A. 15-16; 245-246, 250, 336; *infra,* pp. 19a-20a). The two plants constitute a single unit for purposes of collective bargaining (A. 15-16, 245; *infra,* 20a).

An unpopular change in employees' work schedule sparked a campaign for unionization in March, 1973 (A. 15-16, 159-164; *infra,* p. 20a). On May 16, 1973, the Union filed a petition for certification in the two plant unit. On July 19 and 20, 1973, the National Labor Relations Board conducted an election among the employees in that unit which the Union lost by one vote (A. 16-17; 164-165, 270-271; *infra,* p. 20a).

The Company was strongly opposed to the Union and conducted a vigorous campaign to defeat it (A. 17; *infra,* 21a). About a month before the election, Personnel Manager Murray interviewed each employee individually and distributed a copy of the Company's "Employee Handbook" which "reflects clearly the Company's hostility to the organization of its employees." (A. 17, 18, 42, 51, 172-173; *infra,* 21a, 22a). The triggering incident here occurred about ten days before the election, when the Company prevented an off-duty employee from distributing union handbills and electioneering for the Union on the Company's parking lot at the Northbrook plant (A. 29; *infra,* p. 33a).

On July 10, 1973, at about 5:30 p.m. (A. 29), during a change of shifts, as one shift was leaving and the other shift coming into the plant (A. 247), James E. Woods, an employee of Plant No. 1 (A. 29, 245-246), entered the parking lot at the Northbrook plant to distribute handbills to his fellow employees and talk to them about the Union (A. 29; 246-247; *infra,* p. 33a). Woods reached the parking lot by a drive from the public street; there is no gate through which to enter the plant property (A. 246, 337).

Woods and Ted Davis, manager of the Northbrook plant, knew each other (A. 245). Davis approached Woods and told him "that since . . . [he] was off duty, . . . [he] wasn't allowed by Company policy to be on Company property" (A. 247, 338). Woods told Davis that he "was going to handbill," but Davis said that handbilling on Company property was not allowed (A. 244; *infra,* 33a). Woods then left the parking lot and handbilled at the entrance to the property (A. 248, 338).

"Davis testified that he was merely enforcing a rule which prohibits off-duty employees from entering upon

company premises" (A. 29; 338-340; *infra* 33a). The Company's Handbook states that "[n]o employee is allowed in the plant at any time other than for regularly scheduled work periods or for activities such as obtaining payroll checks, insurance matters, consulting management or other Company related business" (A. 42, 172-173), but it makes no mention of presence on the parking lot. According to the Company, new employees are orally informed that they must leave the plant within 30 minutes after the end of their shift and arrive at the plant no sooner than 30 minutes before the start of their shift (A. 246, 247, 338-339).

A. The Board's Decision and Order

The complaint alleged that the Company's debarment of Woods from the parking lot to distribute union literature and to talk about the Union to his fellow-employees constituted an unfair labor practice violative of section 8(a)(1) of the Act. The Administrative Law Judge dismissed this part of the complaint, stating that, "[i]n accordance with the Board's holding in * * * *Lenkurt,* * * * I find that the foregoing incident does not constitute a violation of the Act" (A. 29; 33a).[4] A three-member panel of the Board, Member John H. Fanning dissenting (A. 14, n. 20; 17a, n. 20), affirmed without comment (A. 3; 5a) the Administrative Law Judge's decision in this respect. In *Lenkurt,* the full Board, by vote of three to two, reversed the position the Board had consistently

[4] The complaint also charged that the Company violated Section 8(a)(1) and (3) of the Act by discharging employee Grubb (A. 19-24, 26-27 and n. 5; *infra,* pp. 20a-32a)). The Administrative Law Judge sustained the complaint but the Board by vote of 2-1 reversed. (A. 3-11; *infra,* pp. 5a to 18a). This part of the Board's decision is not before this Court, p. 1, n. 1 *supra.*

maintained for seventeen years—that off-duty employees have the same Section 7 right as on-duty employees to distribute union literature and talk about unionization to fellow employees on plant parking lots.

B. Antecedents of Lenkurt

Entitlement of off-duty employees to the self-organizational rights upheld by this Court in *Republic-Le Tourneau* (*Republic Aviation Corp.* v. *NLRB,* 324 U.S. 793, (1945)), was challenged shortly after this Court's decision in *NLRB* v. *Babcock & Wilcox Co.,* 351 U.S. 105 (1956). In *Cranston Printing Works Co.,* 117 NLRB 1834, 1842 (1957), enf't denied, 258 F.2d 206 (4 Cir., 1968), the Board refused to sanction denial of those rights to off-duty employees, holding that in *Babcock & Wilcox:*

> "* * * the Supreme Court distinguished only between employees of an employer and nonemployee organizers, saying, with certain limitations not here relevant, that 'no restriction may be placed upon the employees' right to discuss self-organization among themselves' [footnote omitted]. In determining to whom this right to distribute union literature extends, we believe that the mutuality of employment interests of all employees of a single employer—whether they are working, on strike or leave of absence or sick leave or temporary layoff or temporary transfer, or have been discriminatorily discharged or are about to quit—is no less determinative of this right than it is of the right to engage in other self-organizational activities fostered and protected by the Act."

Until *Lenkurt,* the Board, with the explicit approval of at least one Circuit, *Republic Aluminum Co.* v.

NLRB, 374 F.2d 183, 185 (5 Cir., 1967), enforcement denied on other grounds, 394 F.2d 405 (5 Cir., 1968), rev'd *en banc,* enforcing *Bauer Aluminum Co.,* 152 NLRB 1360 (1965);[5] see also, *United Steelworkers of America* v. *NLRB,* 129 U.S. App. D.C. 260, 262, 393 F.2d 661, 663 (1968), consistently adhered to that position, *e.g., Westinghouse Electric Corp.,* 199 NLRB 783, 787-788 (1972), enforced 480 F.2d 920 (3 Cir., 1973), cert. denied, 414 U.S. 1002 (1973).

In 1971, in *Diamond Shamrock Co.* v. *NLRB,* 443 F.2d 52, the Third Circuit decided that under *Babcock & Wilcox,* off-duty employees are not entitled to *Republic-LeTourneau* rights because they are not present on the employer's property "pursuant to the work relationship," *id.* at 56, 57, 58-59. It held that inasmuch as the presence of off-duty employees is not necessary to or desired by the employer, his property right entitles him to exclude them, as it entitles him to exclude outsiders, despite the resulting denial of opportunity to exercise self-organizational rights. Thus, the court reasoned, *Babcock & Wilcox* precludes curtailment of the employer's property right non-discriminatorily to bar off-duty employees from plant prop-

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[5] In *Republic Aluminum, supra,* 374 F.2d at 185, the Fifth Circuit panel agreed that "[p]rinciples applicable to the rights of nonemployee union organizers [citing *Babcock & Wilcox*], are not applicable here." It denied enforcement on the theory that *NLRB* v. *United Steelworkers of America,* 357 U.S. 357 (1958), required proof of "lack of effective alternative means for bringing the union message to the employees" as a condition precedent of invalidation of a no-distribution rule directed against *employees. Id.* at 185-186. The court *en banc* reversed the latter holding and enforced the Board's order. See p. 8, n. 6, *infra.*

erty, absent a showing of unavailability of other avenues for organizational communication.[6]

C. The Lenkurt Decision

In *Lenkurt* (decided July 1, 1973), the Board majority adopted the Third Circuit's analysis and extrapolation of *Babcock & Wilcox*. Like the Third Circuit (443 F.2d at 56, 57), the majority asserted (204 NLRB at 921), that a rule barring access to the employer's property requires balancing of different interests than a rule barring handbill distribution by employees who are on the premises "in connection with [their] work": the latter implicates merely the employer's interests in "production, safety or discipline," whereas the former "requires a balancing of the employees' Section 7 rights against the employer's private property rights. See *Diamond Shamrock Co.* v. *NLRB,* 443 F.2d 52 (C.A. 3, 1971)." [Footnote number omitted.] (*Infra,* 40a).

The majority reasoned that off-duty employees are no more entitled to access to their employer's property for organizational purposes than non-employees inasmuch, as a matter of common law, "for purposes not protected by this Act" both are "invitees to the same extent and one is no more entitled than the other to admission to the premises. We are unable to conclude

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[6] In the same opinion, the Third Circuit also adhered to its interpretation of *Babcock & Wilcox* and *NLRB* v. *United Steelworkers of America,* 357 U.S. 357 (1958), in *NLRB* v. *Rockwell Mfg. Co.,* 271 F.2d 109 (3 Cir. 1959), as prohibiting invalidation of non-discriminatory no-distribution rules directed against on-duty employees absent proof of unavailability of other means of communication (443 F.2d at 59-60), while acknowledging (at 60, n. 27) that "three courts of appeals have specifically considered and rejected this court's reasoning in *Rockwell Mfg.*" Cf. *NLRB* v. *Magnavox Co.,* 415 U.S. 322, 326-327 (1974).

that a different rule is required where union organization is involved * * *." (*Id.*, at 922; *infra*, 41a). The majority therefore concluded that a rule which

> "denies off-duty employees access to the premises for any purpose and is not disparately applied against union activities, is presumptively valid absent a showing that no adequate alternative means of communication are available." (*Id.*) [7]

In dissent, Members John H. Fanning and Howard Jenkins, Jr., stated (204 NLRB at 922-923), that while the no-access rule

> "does not contain a specific ban on union solicitation or distribution, its maintenance has the effect of forbidding employees on . . . [the employer's] three shifts to engage in such activity in nonwork areas at any time except during their own breaks and immediately before and after their own shifts.
>
> The solicitation rights of both off-duty and on-duty employees are equally affected by the considerations which underlie the presumptive invalidity of no-solicitation rules, namely, that (a) time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property [*Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793, 803, n. 10, (1945)]; (2) the plant and its premises are normally the only places where all employees congregate and may af-

[7] Inasmuch as the employee distributors in *Lenkurt* were employed in the plant from whose parking lot they were barred, and the majority in this case relied explicitly and exclusively on *Lenkurt*, it can have attached no significance to the fact that Woods was employed at another plant in the same bargaining unit. Cf. *Great Atl. & Pac. Tea Co.*, 123 NLRB 747, 754 (1959) enf'd as modified, 277 F.2d 759, 760-764 (5 Cir., 1960) (reasoning for modification limited to retail stores).

ford the only practicable opportunity for discussing self-organization; and (3) solicitation in nonworking time and places could not normally affect safety and production. The presumption was not overcome in the instant proceeding as . . . [the employer] neither claimed nor proved any legitimate justification for its broad nonaccess rule.

While our colleagues appear to subscribe to the foregoing well-established principles insofar as they apply to on-duty employees, they depart therefrom in holding that off-duty employees are more nearly analogous to nonemployees. By arbitrarily finding that off-duty employees are subject to the principles applicable to nonemployees, they fall into the error of concluding that off-duty employees have no greater rights than nonemployees, thus completely obliterating any distinction in their status under the Act. Our colleagues furnish no factual basis for their unwarranted and unrealistic conversion of off-duty employees to nonemployees. Nor do they invoke any statutory or judicial sanction for so doing.

In *N.L.R.B.* v. *Babcock & Wilcox*, . . . [351 U.S 105, 113 (1956)], the Supreme Court, reiterating its earlier decision in *N.L.R.B.* v. *Republic Aviation, supra,* held that 'No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline.' In view of this guiding principle enunciated by the Supreme Court and followed in a recent decision of the Board, it is clear that off-duty employees who wish to remain on the premises or enter the plant for purposes of solicitation or distribution of union literature may do so subject to the employer's need to maintain production, discipline, or security.

Our colleagues fail to take cognizance of the Supreme Court's affirmation of long-established prin-

ciples by endorsing a sweeping nonaccess rule which runs afoul of the Act because it thwarts the right of employees on the three shifts to communicate with each other on their Employer's premises during their non-working time for the purpose of discussing self-organization among themselves. The most serious defect of this rule, which is destructive of the employees' protected right to promote self-organization, is that it compartmentalizes the employees in each shift and completely isolates them from their fellow employees on other shifts. The rule also possesses a further legally undesirable shortcoming in that it renders difficult, if not impossible, any discussion before or after work between employees on a particular shift as the rule appears to limit the employees' presence at the plant and premises to the brief time necessary to prepare for or leave work."

D. The Decision Below

The panel of the court below enforced the Board panel's majority decision without opinion. In a statement explaining why he voted to deny rehearing *en banc*, Chief Judge Bazelon said, in part (*infra*, 3a): "This case presents an important issue which is kept alive by the split in the Circuits on its resolution." [5]

REASONS FOR GRANTING THE WRIT

The validity of the distinction between off-duty and on-duty employees is of substantial importance in administration of the Act, and should be settled by this Court in this case. Decision turns on analysis and interpretation of the rationale of this Court's decisions in *Republic-LeTourneau* and *Babock & Wilcox*. In

[5] The "split" referred to is between the Fifth Circuit, on the one hand, and the Third Circuit and the panel of the court below on the other, see pp. 6-8, *supra*, pp. 13-14, *infra*.

this respect there is square conflict between the Circuits. Conflicts of this type uniquely merit this Court's attention. Correct resolution is also of great practical importance, for the entitlement, *vel non,* of off-duty employees to *Republic-LeTourneau* rights[9] affects all employees and employers covered by the Act.[10] The impact is not limited to initial organizing campaigns. *NLRB* v. *Magnavox Co.,* 415 U.S. 322 (1944).

Moreover, in light of the posture of the issue before the Board, unless review is granted in this case, the question is likely to be settled permanently against the claimed statutory right, without any review by this Court. This is so because "the General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint" (*Vaca* v. *Sipes,* 386 U.S. 171, 182), and will likely so refuse in any subsequent case on the authority of the decisions in *Lenkurt* and this case, which he would reasonably consider controlling. Therefore, the question is not likely to be presented again to the Board (*NLRB* v. *Sears Roebuck & Co.,* 44 L.Ed.2d 29, 40 (1975)), and, hence, no Court of Appeals will hereafter have occasion to decide it. Thus, there will be no vehicle for its presentation to this Court.

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[9] Conditioning the right to access to cases where alternative avenues of communication are unavailable, as with non-employees, is tantamount to denial of the right altogether, for the burden of proof of unavailability imposed by the Board on the General Counsel is virtually impossible to meet. *Monogram Models,* 192 NLRB 705 (1971); *Falk Corp.,* 192 NLRB 716 (1971).

[10] Enterprises in which all employees are on a single shift and have the same lunch period and vacation schedule are affected less seriously than others, but even as to them the holding is significant for it enables the employer to virtually deny opportunity to distribute and solicit before and after work by shortening to minutes the amount of pre- and post-shift time employees may spend on the property.

A. There Is Square Conflict Between the Circuits

The panel decision below, and the decision of the Third Circuit in *Diamond Shamrock, supra,* p. 7, are in square conflict with the decision of the Fifth Circuit in *Republic Aluminum, supra,* pp. 6-7, and *NLRB* v. *Litho Press of San Antonio,* 512 F.2d 73, 76 (1975). In *Republic Aluminum,* the Fifth Circuit *en banc* held invalid an employer's "rule against coming on [company] property without permission" (394 F.2d at 407),[11] as applied to prevent "off-duty employees" from distributing union literature and soliciting union membership (*id.*) on the plant parking lot at shift change time. *Ibid.,* at 406-407.[12]

More recently, in *Litho Press, supra,* the Fifth Circuit reiterated its disapproval of the distinction between on-duty and off-duty employees. There, the employer prohibited Tipton, an employee on vacation, from distributing union handbills and "talking union talk" in the driveway of the plant. Litho Press con-

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[11] The court stated: "The issue before us is whether the Company had the right to enforce, against Johnson and Swaner [off-duty employees] the rule against coming on the property without permission when their purpose was to distribute union literature and solicit union authorizations." Johnson and Swaner were on the first shift, which ended at 3:00 p.m. They entered the parking lot at 10:30 p.m., to contact employees coming off the second shift at 11:00 p.m. *Bauer Aluminum Co.,* 152 NLRB 1360, 1367, 1368 (1965).

[12] The court also expressed disagreement with the Third Circuit's *Rockwell* theory, p. 8, n. 6, *supra,* that unavailability of alternative avenues of communication is a condition of the *Peyton Packing Company* presumption of invalidity of a no-solicitation rule, see *Peyton Packing Company, Inc.,* 49 NLRB 828, at 843, enforced *NLRB* v. *Peyton Packing Company,* 142 F.2d 1009 (5 Cir. 1944), *cert. denied* 322 U.S. 730 (1944), and of the *Republic-LeTourneau* rule. 394 F.2d, at 408.

tended that the rights of an employee on vacation "should be distinguished from those accorded an active employee." The court held the prohibition invalid, stating (512 F.2d at 76):

> "While such a distinction might be apropos if special circumstances, such as security or productivity, demand it [footnote omitted]; this circuit recognizes no such differentiation as to one in Tipton's status. See Republic Aluminum Co. v. N.L.R.B., 394 F.2d 405 (5th Cir., 1968). See also Westinghouse Electric Corporation, Tampa Division, 119 N.L.R.B., 783, 786-87 (1972)."

The Eighth Circuit has taken a third tack:

> "we suggest that once the employee has left his employer's premises and returns to engage in union activity, he may have attained a status as to § 7 rights somewhere between that of an employee and that of a non-employee." *McDonnell Douglas Corporation* v. *NLRB,* 472 F.2d 539, 547 (8 Cir., 1973).

B. The Conflict Stems from Inconsistent Analyses of This Court's Decisions

The basic premise of the theory that off-duty employees are to be equated with outsiders for the purpose of solicitation and literature distribution rights is that *Republic-LeTourneau* did not involve a balancing of employee organizational rights against employer property rights, but only against "the employer's interest in production, safety or discipline." *Lenkurt,* 204 NLRB at 921; *Diamond Shamrock,* 443 F.2d at 56. The seminal assumption is that the employer's property rights were not involved or impinged because the employees "were lawfully and properly on the employer's prem-

ises pursuant to the work relationship." *Id.* But examination shows that employer property rights *were* deemed to be involved and were expressly subordinated to Section 7 rights; the contrary view is simply untenable.

In *LeTourneau,* 54 NLRB 1253, 1259 (1944), the Board explicitly stated that decision

> "requires an evaluation of conflicting rights and policies—the employer's right to regulate the use of his own property, on the one hand, as against the employees' right to receive information to enable them to exercise their right to self-organization, which it is the policy of the Act to encourage. It is well settled in our law that certain rights are not absolute, but qualified, and that where conflicts between rights arise, a determination must be made as to which should give way, and which should be deemed paramount, in order to achieve the greater good."

In *Republic Aviation,* 324 U.S. 793, 801, n. 8, this Court quoted from the Board's *LeTourneau* decision the Board's "reasons" (*id.* at 802) for resolving the conflict against the employer's property rights. The quotation begins: "As the Circuit Court of Appeals for the Second Circuit has held, 'It is not every interference with property rights that is within the Fifth Amendment * * *. Inconvenience, or even some dislocation of property rights, may be necessary * * *.'" In *Babcock & Wilcox,* 351 U.S. at 109-110 (1956), this Court said that in *LeTourneau*:

> "the Board balanced the conflicting interests of employees to receive information on self-organization on the company's property from fellow employees during nonworking time, with the *employer's right to control the use of his property* * * *." (Emphasis added.)

The "employer's right to control the use of his property" is infringed no less by invalidation of a no-solicitation and no-distribution rule than by invalidation of a rule barring employee access to or presence on parking lots before or after employer-defined "working hours." Insistence that employer property rights were not involved in *Republic-LeTourneau* overlooks that the "NLRA is itself a limitation on property rights to the extent required for effective self organization." [13] *Labor Board* v. *Stowe Spinning Co.*, 336 U.S. 226, 232 (1949).

That the ultimate inquiry in *Republic-LeTourneau* was whether prohibition of organizing on non-working time is justified by special circumstances, or by substantial employer interests in production, discipline and avoidance of littering—does not mean, as the Third Circuit and the current Board majority inferred, that employer property rights were not weighed but, on the contrary, that, as the Second Circuit put it, "We have long passed the point where the bundle of property rights can be used *arbitrarily or capriciously* to restrict a worker's freedom of association or expression." *NLRB* v. *United Aircraft Corp.*, 324 F.2d 128, 131 (2 Cir. 1963), cert. denied, 376 U.S. 951 (1964) (emphasis added). The same test would apply to a no-access rule. "A no-trespass rule would be governed by the same principles [as a no-solicitation rule] where the trespass was for the purpose of soliciting and distribution of literature." *Republic Aluminum Company* v. *NLRB*, 374 F.2d 183, 185 (5 Cir., 1967), rev'd on other grounds *en banc*, 394 F.2d 405 (5 Cir. 1968). And the substan-

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[13] *Right of Off-Duty Employees To Enter and Remain on Employer Premises for Organizational Purposes*, 54 B.U.L. Rev. 199, 204 (1974), hereinafter cited "*Right of Off-Duty Employees.*"

tial interests which the employer's "property right" is designed to guard are prejudiced no more by invalidation of a no-access rule than by invalidation of a no-distribution rule. "Does the off-duty employee who comes in early and begins to solicit realistically invade the employer's property interests more than one who gives up a lunch break to solicit on his own shift? The distinction is merely formal." [14]

The only justification advanced for excluding off-duty employees from the category of "employees" on whose rights "no restriction may be placed" (*Babcock & Wilcox*, 351 U. S. at 113), is that they are not on the employer's premises "in connection with their jobs" (*Lenkurt*, 204 NLRB at 922). But that distinction is demonstrably irrelevant to the policies to be weighed in resolving the conflict between property rights and Section 7 rights.

Peyton Packing, Republic-LeTourneau and *Babcock & Wilcox* are all premised on the view that distribution of union literature and solicitation of union membership on plant parking lots "by employees to employees * * * on non-working time" (*NLRB* v. *Magnavox Co.*, 415 U.S. at 325, is as intimately and as legitimately an incident of the employer-employee relation as any work-related activities beneficial to the employer. Indeed, this Court has recognized that the "[t]he place of work is a place uniquely appropriate" (*ibid.*), for the exercise of self-organizational rights by employees.[15]

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[14] *Right of Off Duty Employees, op. cit., supra*, p. 16, n. 13, at 205.

[15] " 'Their place of work is the one location where employees are brought together on a daily basis. It is the one place where they clearly share common interests and where they traditionally seek to persuade fellow employees in matters affecting their union

It does not cease to be "uniquely appropriate" with every change of shift. Why, then, should the employer's bare "property right" to limit employee access to parking lots to "working hours" enable him to thwart exercise of organizational rights at times convenient to employees? And why should an employer be able to thwart exercise of rights Congress conferred on employees for their benefit in the employment relation on the theory that exercise of those rights is not "Company related business?" [16]

The existence and exercise of employee self-organizational rights are not a temporal incident of work performance; on the contrary, "[w]orking time is for work." *Republic Aviation*, 324 U.S. at 864, n. 10, quoting *Peyton Packing*, 49 NLRB at 843. No one doubts that, locale apart, employee organizational activity is as appropriately conducted during off-shift hours as before and after work and during lunch time. Moreover, as the dissenting Board members stressed in *Lenkurt* (p. 11, *supra*), denial to off-duty employees of access to parking lots prevents them from contacting for organizational purposes fellow employees on other

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organizational life and other matters related to their status as employees.'" *NLRB* v. *Magnavox Co.*, 415 U.S. 322, 323-324 (1974), quoting from *Gale Products*, 142 NLRB 1246, 1249 (1963). "Normally the plant and its premises are the only place in which all employees congregate, and hence may afford the only practicable opportunity for the initial steps by which self-organization is effected." *Tomlinson of High Point, Inc.*, 58 NLRB 982, 986 (1944).

[16] Fiberfil's employee handbook provides that off-duty employees may enter the plant during non-working hours for non-work "activities such as obtaining payroll checks, insurance matters, consulting management, or other Company related business" (p. 5, *supra*.)

shifts.[17] To sustain such a ban without justification other than the employer's bare "property right" is totally at odds with the premise that, vis-a-vis *employee* rights, balancing is required:

> "the * * * property rights rationale in *Lenkurt* seems particularly arbitrary if one notes that workers have no *inherent* right to engage in union activities on employer property during their lunch hours and rest breaks. Both *Lenkurt* and *Diamond* [*Shamrock*] described such periods as time during which employees are "lawfully" on the employer's premises. The law that grants them such a right is not property law, however, but labor law—*Republic Aviation*—which had to reject the very property rights arguments advanced in *Lenkurt*. Aside from the protection afforded by labor law, nothing prevents an employer from treating his employees as off-duty during their break periods. Absent labor policy, traditional notions of private property would recognize an employer's right as landowner to withdraw his permission to be on his property at will." (Footnotes omitted.) [18]

Thus, it is the absence of any employer-employee relationship, not the presence of a property right vis-a-vis

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[17] The assertion of the majority in *Lenkurt*, 204 NLRB at 922, *infra* 41a, that the Board's change of position is "no significant diminution of * * * employee rights" because on-duty employees retain "the right to engage in union activities * * * during * * * nonwork periods when employees are on the premises in connection with their jobs," ignores both the isolation of employees on nonoverlapping shifts and the employer's power to hold to a minimum the time before and after work during which employees may be on the property. See p. 12, n. 10 *supra*. Moreover, this approach is a back door reintroduction of the "adequate alternative avenues of communication" theory which this Court again rejected as to employees in *Magnavox*, *supra*, p. 8, n. 6.

[18] "*Right of Off Duty Employees*," *supra*, p. 16, n. 13, at 205-206, see also, n. 42, p. 204.

one but not the other, which distinguishes the status of a stranger from that of an on- or off-duty employee in the *Babcock & Wilcox* context.

Accordingly, the Board's *Lenkurt* reasoning (204 NLRB at 922) is quite irrelevant:

> "It seems apparent that for purposes not protected by this Act off-duty employees and nonemployees would be invitees to the same extent, and one is no more entitled than the other to admission to the premises. We are unable to conclude that a different rule is required where union organization is involved * * *." [19]

That reasoning overlooks, of course, that solicitation and literature distribution on company property "for purposes *not* protected by this Act," are vulnerable to employer prohibition, no matter how arbitrary, for the very reason that such purposes *lack* statutory protection. The "allowed intrusion on property rights is limited to that necessary to facilitate the exercise of employee § 7 rights." *Central Hardware Co.* v. *NLRB*, 407 U.S. 539, 545 (1972). To deny organizational rights to off-duty employees by equating those rights with unprotected causes is completely subversive of Section 7.

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[19] As the authorities cited in "*Right of Off Duty Employees*," *supra*, p. 204, n. 41, establish, the Board's equation of outsiders and off-duty employees as "invitees to the same extent" is open to doubt even in common law terms and the power of property owners to exclude even "trespassers" is often subordinated by the courts to contravening public interest considerations. As for the difficulty of classifying off-duty employees in common law categories, see *McDonnell Douglas Corporation* v. *NLRB*, p. 14, *supra*.

C. The Majority Decision Is Entitled to No Deference.

As we have shown, distinguishing between off-duty and on-duty employees, like failure to distinguish between employees and non-employees, "rests on an 'erroneous legal foundation.'" *Babcock & Wilcox, supra,* 351 U.S., at 112-113. The interpretation of this Court's decisions for which the Board majority opted in *Lenkurt* reverses seventeen years of administrative precedent. Cf. *United States* v. *Chicago, N. S. & M. R. Co.,* 288 U.S. 1, 13 (1933). It reads "a new and more restrictive meaning into [Section 7]" (*NLRB* v. *Bell Aerospace Co.,* 416 U.S. 267, 289 (1974)), without a scintilla of justification in experience, reason or insight. It strikes incorrectly the balance "between conflicting interests." *Labor Board* v. *Brown,* 380 U.S. 278, 292 (1965). It should be reviewed and overturned by this Court.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted and the decision below reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1974

No. 74-1777

DISTRICT 153 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

FIBERFIL, DIVISION OF DART INDUSTRIES, INC., *Intervenor*

PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: TAMM and MACKINNON, Circuit Judges and JAMESON,* United States Senior District Judge for the District of Montana

Judgment

This cause came on for consideration on a petition for review of an order of the National Labor Relations Board and briefs were filed by the parties. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 13(c). On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the order of the National Labor Relations Board on review herein is hereby affirmed, on the basis of the Board's decision and order, 210 N.L.R.B. 163 (1974).

Filed April 24, 1975. *Per Curiam*

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1974

No. 74-1777

DISTRICT 153 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

FIBERFIL, DIVISION OF DART INDUSTRIES, INC.,
Intervenor

Before: Tamm and MacKinnon, Circuit Judges; Jameson*, U.S. Senior District Judge for the District of Montana.

Order

On consideration of petitioner's petition for rehearing, it is

ORDERED by the Court that petitioner's aforesaid petition is denied.

Filed, June 19, 1975

Per Curiam
For the Court:
/s/ Hugh E. Kline
HUGH E. KLINE,
Clerk

* Sitting by designation pursuant to Title 28 U.S. Code Section 294(d).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1974

No. 74-1777

DISTRICT 153 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

FIBERFIL, DIVISION OF DART INDUSTRIES, INC.,
Intervenor

Order

Petitioner's suggestion for rehearing *en banc* having been transmitted to the full Court and no Judge having requested a vote thereon, it is

ORDERED by the Court *en banc* that petitioner's aforesaid suggestion for rehearing *en banc* is denied.

For the Court:
/s/ Hugh E. Kline
HUGH E. KLINE,
Clerk

Statement of Chief Judge Bazelon as to why he voted to deny rehearing *en banc*:

This case presents an important issue which is kept alive by the split in the Circuits on its resolution. Since the instant decision has *no* precedential value in regard to this resolution, I vote against rehearing.

Filed, June 19, 1975

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 25-CA-5777

FIBERFIL, DIVISION OF DART INDUSTRIES
and
DISTRICT 153 OF THE INTERNATIONAL ASSOCIATION
OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Decision and Order

On February 5, 1974, Administrative Law Judge Herbert Silberman issued the attached Decision in this proceeding. Thereafter, counsel for Respondent filed exceptions and a supporting brief and counsel for General Counsel filed limited cross-exceptions to the Administrative Law Judge's Decision and a supporting brief, and a brief in support of certain other findings of the Administrative Law Judge.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the rulings, findings,[1] and

[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3). We have carefully examined the record and find no basis for reversing his findings. We also find no merit in Respondent's contentions that the Administrative Law Judge failed to objectively consider the evidence presented; improperly shifted the burden of proof to Respondent; and engaged in improper and hostile questioning of Respondent's witnesses.

conclusions of the Administrative Law Judge only to the extent consistent herewith.

We agree with the Administrative Law Judge's recommended dismissal of those allegations in the complaint and the amended complaint that Respondent's actions constituted independent violations of Section 8(a)(1) of the Act. However, we are unable to agree with the Administrative Law Judge that Respondent violated Section 8(a)(1) of the Act in its dismissal of Darrell Grubb. Since we find no violation in Grubb's termination, we shall dismiss the complaint in its entirety.

Except for a short layoff, Darrell Grubb worked for Respondent as a machinist from September 1967 until August 12, 1973, the date of his discharge. On Monday August 6, 1973,[2] Grubb's scheduled vacation ended and he was to report to work that day. However, at 6:30 a.m., on Augsut 6, Grubb called Respondent and notified his group leader that he was very ill and would not be in to work but was going to the doctor. The group leader thereafter informed Respondent's management of Grubb's phone call. The Administrative Law Judge found that in his phone call Grubb did not indicate how long he would be absent from work.

Grubb then visited his doctor who advised him that he should rest and remain away from work for a week, until August 13.[3] Thereafter, Grubb did not call Respondent to inform it of his status until later in the afternoon of Sunday, August 12. When he did call to find out what time he should report on August 13, Grubb was told that he should report to the personnel office the following day. Instead, Grubb called Respondent's personnel manager, Joan Mur-

[2] All dates are 1973 unless otherwise indicated.

[3] Grubb's doctor also gave him a slip to that effect to give Respondent when he returned to work.

ray, that next day and was told at that time that he had been terminated. Grubb testified that he asked Murray whether he had been fired because of his union activities[4] and, when she replied no, he then stated that he was not a probationary employee and "in the past they had given the employees verbal warnings, written warnings, two day layoffs and five day layoffs and [he] asked her what happened to those" to which she replied that "they had to stop it here."

Respondent's officials testified that Grubb's discharge was a result of his failure to report his intended absence, as required by company rules, on those additional days of scheduled work that Grubb missed after his initial call in on Monday, August 6.[5] Respondent's officials testified that on Friday, August 10, the Company called its labor counsel in Los Angeles and explained that Grubb had missed 2 days of work without calling in and asked if it was all right to proceed in the normal course of company policy with regard to employees who do not call in their absences.[6] Its labor counsel approved the sending of an already pre-

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[4] Grubb was in fact a vigorous union adherent. Just before Grubb left on his vacation, there had been a union election at Respondent which had come about as a result of a petition for an election that Grubb had been greatly responsible for securing. During the election campaign, Grubb had been visibly vigorous in his support for the Union Charging Party here and Respondent was aware of Grubb's sympathies. Grubb had also been active in supporting another union's campaign at Respondent in 1972. Both unions lost the elections held at Respondent.

[5] Grubb was also scheduled to work Tuesday, Friday, and Saturday of that week.

[6] The call to its labor counsel was admittedly an unusual action but Respondent's production superintendent, Charles Mohle, testified that Respondent knew Grubb was a union adherent and so wanted legal advice on the course they were planning to take relative to Grubb's failures to call in.

pared warning notice [7] to Grubb which informed him that, due to his failure to call in,[8] any further failure to do so would result in his termination.[9] The letter was mailed from a local post office about 4 p.m. Friday, August 10. The letter was sent special delivery, certified mail, return receipt requested, and, pursuant to instructions, was to be delivered only to the addressee, Grubb. An attempt to deliver the letter was made on Saturday, August 11, but Grubb was not at home at that time [10] and so a notice was left that a special delivery letter was waiting for him at the post office. Grubb had not yet picked up the letter when he called in to Respondent on Sunday afternoon.

Since Grub did not call in at any time on Saturday, August 11, Respondent prepared his termination papers on the next day, August 12, with his termination effective on that later date.

Respondent had argued to the Administrative Law Judge that Grubb's termination was pursuant to a consistent and nondiscriminatory exercise of a uniformly enforced company rule on the reporting of absences. The Administrative Law Judge, however, found that there was no rule, either in writing, or promulgated orally, or established by custom or practice, which called for Grubb's automatic dis-

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[7] Mohle testified that a phone call was not possible since Grubb had an unlisted number.

[8] In the letter, Respondent made reference to Grubb's failure to call on August 7 and 10 of that week and a prior failure to report an absence on July 1. See below for details of the July 1 incident.

[9] Its labor counsel also recommended that Respondent not terminate Grubb unless Grubb failed to call in at all on Saturday, August 11.

[10] Grubb testified that he had gone to the home of a friend so that the friend and his wife could take care of him.

charge here. He further found that Respondent's attempt to warn Grubb of his impending infraction of Respondent's "rule" was so "contrived" that it supported the General Counsel's assertion that Respondent sought to use Grubb's absence from work to conceal its underlying unlawful motive for discharging him. We disagree with both conclusions of the Administrative Law Judge.

There was much litigation as to exactly what, in fact, Respondent's rule was with regard to reporting absences. From the testimony of the various witness, and Respondent's records that were introduced at the hearing, we find it fair to state that Respondent's rule, as it was enforced, called for an employe to call in on each day of his absence from work unless he informed Respondent in advance how long he was going to remain away from work. If an employee informed Respondent that he was hospitalized or under a physician's care at the outset of his illness such would be sufficient notice. If an employee was absent for 3 days or longer, he was to bring a doctor's statement to verify his illness. However, if an employee did not call in for 3 consecutive days or if an employee called in the first day to report he was ill without mentioning he was in a hospital or under doctor's orders to remain away from work and thereafter did not call in for 3 consecutive days, he was then subject to termination.

In determining that this is a fair statement of Respondent's rule we note the following:

In Respondent's present employee manual, issued to the employees in 1973, Respondent states that an employee is to "call in and report for each *shift* [he] must miss as long as [he is] off." The administrative manual that Respondent distributes to its management officials then goes on to state that "An employee who is absent for three

days without notifying his supervisor will be terminated.[11] Exceptions may be granted only in unusual circumstances by the chief executive of the employee's organizational unit at the location."

With regard to the employees' understanding of the rule, we note that their impressions of the rule, as witnessed by the examples they supplied at the hearing, indicate that they construe the rule as we have set out above. The testimony of employees Temme, Vick, and Clark indicates that each employee when he had been out ill for 3 days or longer had Respondent notified at the beginning of his illness that he was hospitalized or under a doctor's care.[12] Such action fully comports with Respondent's rule as we have noted above since in each case Respondent was told of a condition which would preclude the employee's attendance at work for a certain period of time and Respondent could budget its manpower accordingly.[13] Ad-

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[11] It is noted that in the policy manual distributed to the employees in the late 1960's it was stated that "an absence of three days without notifying the company is considered a resignation without notice." There is no evidence revealing the reason for the change in wording in the later employee manual.

[12] Employee Temme testified that in 1972 he had a motorcycle accident in front of Respondent's plant. He then told his group leader he was going to the hospital and after he went to the hospital he returned to the plant and informed his group leader that he had been advised to stay off his leg for a while. He returned to work a week later with his doctor's slip. Employe Vick testified that he once had strep throat which his doctor said would keep him from work for 3 to 4 days. Vick thereafter called Respondent and told it of his doctor's instructions and his status was then relayed to his foreman. Employee Clark testified that once, when his back was bothering him, he went home from work sick and thereafter went into the hospital. He testified that the insurance company then notified Respondent that he was in the hospital.

[13] We note too that employees Knott and Jessie testified that they understood that if they were going to be off they were to

ditionally, we find that the employees' impression of the rule was not, as the Administrative Law Judge found, at substantial variance with Respondent's officials' view of the rule, since both Respondent's officials Mohle and Smallwood stated that if an employee has told Respondent that he is in the hospital or under a doctor's care he need not call in on each day of his illness, although, as would be reasonable, Respondent would desire an approximation of the length of the illness.

Also persuasive in our finding that Grubb's discharge was nondiscriminatory are the records Respondent introduced at the hearing concerning other employees who had been discharged between 1966 and 1973 for violating the rule on calling in to report absences. The records of some 25 employees who had worked at Respondent for periods ranging from 4 days to a little over 4 years were introduced. While the records of 20 of the 25 employees indicate that they, unlike Grubb, at no time had called in to Respondent to report their absence before they were discharged, we take special note of the records of employees James Walden, Robert Bruce, Oscar Rice, Charles Cooper, and Carl Chandler. These five employees had all either left work sick, or called in sick only on the first day of an extended absence like Grubb, and thereafter missed at least

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call in to Respondent to report such absence. Grubb's own records indicate that the had consistently made it a point to call Respondent on each day that he was out ill if it was a scheduled workday. Among other times, he had done so in June 1968, January and November 1972, and as recently as June 1973. The last time, Grubb had called in ill on June 29 and 30 but failed to call in on July 1, when he was also out. Thereafter when he returned to work on July 4, he was told he should have called in on July 1 to report his intended absence. The Administrative Law Judge should not have discounted this last example simply because Grubb was not also told at that time he could be subject to automatic discharge for missing 3 days in a row without calling in.

three consecutive scheduled workdays. In each case the employee was discharged as was Grubb.[14]

In the face of these five employees' records which are strikingly similar to Grubb's situation, the Administrative Law Judge discounted them by relying on a statement of Respondent Official Mohle that Grubb's situation was in fact "unique" *vis-a-vis* all the other employee records submitted. To elicit such a response from Mohle ,the Administrative Law Judge asked Mohle whether the following situation had ever arisen at Respondent: an employee on his first day of absence calls Respondent to advise if he is sick and is going to consult a doctor. Thereafter the employee does not report his absence further to Respondent for 3 consecutive days but *prior to notification of his discharge, he seeks to return to work.*

While this description of Grubb's situation elicited Mohle's comment that Grubb's situation was unique, and prompted the Administrative Law Judge to disregard Respondent's records, the description in fact injected an irrelevant element (the underlined portion of the situation as noted above) into the consideration of whether Grubb's discharge was discriminatory since the fact that Grubb sought to return to work before being formally notified of his termination cannot impute a discriminatory motive in that discharge if, in fact, Grubb had violated Respondent's rule on calling in prior to his attempted return to work. This is what we are finding here and the fact that Grubb

[14] While the dissent alludes to the fact that four of the five employees noted above were probationary employees when they were discharged, there is no evidence to indicate that Respondent applied a more stringent call-in standard to probationary employees than to nonprobational employees. The evidence presented to us indicates Respondent's rule was uniformly enforced on all categories of employees and thus the fact that four of these five employees were coincidentally probationary employees is of no significance here.

may have attempted to return to work before he was notified of his discharge does not make the five employees' records on which we rely any less valid as mirrors of Grubb's situation. Further, in light of the employment history of James Walden, one of the five employees whose record is noted above, Grubb's situation was not in any event "unique" even by the Administrative Law Judge's example.[15]

In summary, we have found that Respondent had a rule on calling in that included the prescription that an employee was to call in for each day he was absent unless he notified Respondent that he was hospitalized or under a physician's care at the outset of his illness. Grubb merely reported to Respondent that he was going to see his doctor on the day he called in, not that he was under a doctor's instructions to remain away from work, and thereafter Grubb did not report to Respondent that his doctor had instructed him to remain away from work for the remainder of the week. Since Grubb did not so inform Respondent and since Respondent had no way of knowing Grubb's situation, Grubb's termination at the end of the week was a consistent application of Respondent's rule as we have noted it above. In such circumstances, we find Grubb's discharge was nondiscriminatory.[16] We also find

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[15] Walden was discharged on June 27, 1973. Respondent's records indicate that he left work on June 22, 1973, and sent word he was still sick on June 23. Thereafter, he did not call in and on June 27 he was terminated for failure to follow Respondent's call-in rule. Walden, like Grubb, called in to Respondent on the day of his discharge and at this time he was informed of his termination.

[16] While the dissent notes that we have set out a rule that is nowhere so fully set out in any of Respondent's written manuals, we are not relying solely on the manuals as evidence that such a rule does in fact exist. We believe that the employees' records submitted by Respondent combined with various of the employees' ac-

nothing "contrived" in Respondent's efforts to contact Grubb to warn him of his impending discharge.

Respondent openly admitted that employees are not usually contacted in cases involving the call-in rule. As mentioned before, however, since Grubb was a vigorous union adherent, Respondent wanted to give Grubb every change to comply with its rule on calling in. To that end, the letter which was sent on Friday, August 10, was designed to reach Grubb not later than Saturday, August 11. Since Respondent had decided, pursuant to its phone conversation with its Los Angeles counsel, to allow Grubb all day Saturday to respond to the letter, we cannot find the sending of the letter by Respondent to have been contrived since in the ordinary course of events Grubb should have received the letter in time to call in.

In finding Respondent 's action to be contrived, the Administrative Law Judge noted that Grubb's house was located about 2 blocks from Respondent's plant while the post office from which the letter was mailed was some 12

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counts of their personal experiences in reporting their absences from work demonstrate that Respondent has a rule as we have set out above. Assuming, without finding that it is true, that, as certain of the employees testified, they have never been informed of the dire consequences for violating the rule or in some cases have never been directly informedl of the rule itself by Respondent's officials, that does not, however, prove a violation here for we again return to the documentary proof of the course of action Respondent has taken in similar situations in the past as support for our finding of no violation here. With respect too, to the dissent's adverse comment on the fact that, because of this one infraction, Grubb was declared ineligible for future employment with Respondent, we note that the submitted records of the 25 employees discharged pursuant to Respondent's rule show that not 1 was declared eligible for rehire. Lastly, we note that counsel for General Counsel could adduce no evidence of any employee who had ever been in Grubb's situation who had not likewise been discharged by Respondent.

blocks from the plant. The Administrative Law Judge then noted that Mohle could not offer any explanation as to why the warning notice had not been delivered directly to Grubb's home which was located 10 blocks closer to the plant than was the post office. The Administrative Law Judge noted that, had the letter been delivered by messenger, Grubb would have then been able to inform the messenger as to his situation within the applicable time limit. In such a circumstance, the Administrative Law Judge found the sending of the notice to have been contrived. In disagreeing, we note simply that the letter was uncontrovertibly designed to reach Grubb before the expiration of the time limit established for him to report in. In such circumstances, the fact that Respondent did not take the further extraordinary step of hand-delivering the warning slip can in no way demonstrate that its chosen way of pursuing this admittedly unusual procedure (done only for Grubb's benefit) was in fact a contrived act.

We shall therefore dismiss the complaint in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated, Washington, D. C., MAY 30, 1974.

ROBERT E. KENNEDY, *Member*

JOHN A. PENELLO, *Member*
NATIONAL LABOR RELATIONS BOARD

(SEAL)

MEMBER FANNING, dissenting:

I agree with the Administrative Law Judge's conclusion that Respondent's discharge of Darrell Grubb was motivated because of Grubb's activities on behalf of the Union and therefore was in violation of Section 8(a)(3) and (1) of the Act.

Grubb had been an employee of Respondent for almost 6 years when he was discharged and there is no contention raised that he was anything but a satisfactory employee during that entire time. Nevertheless, because of his single failure to comply with Respondent's alleged rule on the calling in of absences, this longtime employee was terminated without any effort being made to ascertain why he had not called in after his initial call—assuming there was such a requirement—or whether there were any circumstances explaining his failure to call in, and for this offense Grubb was declared ineligible for future employment with Respondent and has not since been rehired.[17]

In its finding no violation here, the majority relies heavily on the employee records of five employees who like Grubb had initially called Respondent to report an illness or had become sick at work, and thereafter had failed to call Respondent for at least 3 days and who were then discharged. I note, however, that four of these five employees were probationary employees at the time of their discharges. Respondent's probationary period is 90 days and employee Carl Chandler had worked for some 49 days; employee Ezzard Cooper had worked for some 19 days; employee Oscar Rice had worked some 58 days; and employee James Walden, whose discharge situation the majority noted was

[17] I note Respondent has in the past rehired at least one employee, Tom Crews, who had previously been terminated for having failed to report his absences from work. Crews' name was not included in the list of 25 employees allegedly declared ineligible for rehire by Respondent for the same "offense" as Grubb committed.

very close to Grubb's, had worked for all of some 16 days, when each was discharged.[18] In fact, of the 25 employees whose records were submitted by Respondent, only 6 employees were nonprobationary employees when they were discharged and only 3 of those 6 had worked at Respondent for longer than 1 year when they were discharged. And the two employees of the six nonprobationary employees with the longest length of service at the time of their discharges, employee Gary Daniels (with 2⅓ years of service) and the employee Maurice Wild (with a little over 4 years of service), were both discharged for *excessive* absenteeism and not simply for missing 3 particular days without calling in. I note that Grubb was a 6-year employee with *no* prior history of note of unexcused absences.

The majority attempts to explicate a rule for Respondent on the calling in to report absences that is nowhere so fully set out in any of Respondent's own manuals to its employees or even to its management officials. The majority also finds that the employees' understanding of the rule was not at substantial variance with that of Respondent's officials, but I note that, while Respondent's officials, Mohle, Smallwood, and Davis, all stated that for the breaking of Respondent's rule on calling in an employee was subject to discharge, that employees Grubb, Temme, Vick, and Knott all testified that they had never been told by Respondent's officials that, if they missed 3 days of work without calling in, they would be discharged.[19]

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[18] In addition, the fifth employee whose situation the majority finds was similar to Grubb's had only worked at Respondent for 4 months at the time of his discharge.

[19] I also not that, although Respondent Official Mohle stated that violations of the rule would result in "automatic" termination, the 25 employee records submitted by Respondent yield four instances, *i.e.*, employees Johnston, Rice, Walden, and Wild, where discharge came after *4* days of unreported absence. This hardly makes for an "automatic" termination standard for violation of the alleged 3-day rule. Further, while the majority has noted that employees

I must conclude therefore that it has not been demonstrated that Respondent had such a rule as the majority proposes for it. I must also conclude, as the Administrative Law Judge did, that Respondent's attempt to "warn" Grubb of his possible impending termination was in fact a subterfuge. In so finding, I note the closeness of Grubb's home to the plant *vis-a-vis* the location of the post office to the plant and the relative ease which would have ensued from simply going to Grubb's home to inquire after his health instead of to the post office with the warning notice and the fact that, in the past, there *had* been occasions when someone was sent by Respondent to Grubb's home; *i.e.*, when Respondent sought Grubb to do overtime work.

Finding no rule which called for Grubb's automatic discharge, and viewing (1) the employee records submitted, with special regard to the fact that the two employees with the longest service who were discharged were let go in part for *excessive absenteeism;* (2) the testimony of Respondent Official Mohle (on the "automatic" nature of a discharge for a "violation" like Grubb's which is refuted by Respondent's records themselves; and (3) the subterfuge involved in the forwarding of the warning notice, I am convinced that Respondent's reasons for discharging Grubb were pretextual. Therefore, looking elsewhere for the reason, I find it in Grubb's vigorous advocacy of union causes of which Respondent was well aware. I therefore find Grubb's discharge to have been violation of the Act,[20]

Knott and Jessie understood that if they were going to be off they were to call Respondent to report such absence, it should be noted that employees Vick and Barnett did not think this had to be done. Clearly, the employees were under no certain view of what their responsibilities in calling in were.

[20] For the reasons stated in my dissent in *GTE Lenkurt, Incorporated*, 204 NLRB No. 75, I would also find that Respondent violated Sec. 8(a)(1) of the Act on July 10, when its plant manager, Ted Davis, refused to allow James Wood, an off-duty employee of Respondent, to handbill employees and talk to them in Respondent's parking lot at its Northbrook plant.

and I would adopt this Administrative Law Judge's findings and conclusions to this effect.

Dated, Washington, D.C. MAY 30, 1974.

John H. Fanning, Member

NATIONAL LABOR RELATIONS BOARD

[dated February 5, 1974]

Decision

* * * * *

STATEMENT OF THE CASE

HERBERT SILBERMAN, Administrative Law Judge: Upon a charge filed by the above-named Union on August 27, 1973, a complaint, dated October 18, 1973, was issued alleging that Fiberfil, Division of Dart Industries, herein called the Company, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended. In substance, the complaint, as amended on November 19, 1973, alleges that the Respondent on August 13, 1973, unlawfully discharged employee Darrell B. Grubb and in mid-April 1973, promoted employee William Richard Temme to the position of group leader on the condition that Temme does not get involved in the Union and that he refrains from giving support to the Union, and thereafter demoted Temme from that position, and, by reason of such discriminations and other conduct set forth in the complaint, Respondent also has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act. Respondent's answer to the complaint denies that it has engaged in the alleged unfair labor practices. A hearing in this proceeding was held in Evansville, Indiana, on December 18 and 19, 1973. The parties were given leave to file briefs with the Administrative Law

Judge and briefs have been received from General Counsel and Respondent.

Upon the entire record in the case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. The Business of Respondent

The Company, a Delaware corporation, maintains places of business at Evansville, Indiana, where it is engaged in the manufacture, sale, and distribution of plastics and related products. During 1973, which period is representative of its operations, in the course and conduct of its business, the Company (a) purchased and caused to be delivered through the channels of interstate commerce to its Evansville plants goods and materials valued in excess of $50,000 and (b) manufactured, sold, and shipped through channels of interstate commerce from its Evansville, Indiana, facilities products valued in excess of $50,000 directly to customers located in States other than the State of Indiana. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

District 153 of the International Association of Machinists and Aerospace workers, AFL-CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

The Company operates two plants in Evansville, Indiana, which are approximately 4½ miles apart. One is called the Northbrook plant and the other Plant No. 1. Except for one incident discussed below, all transactions with

which this case is concerned occurred at Plant No. 1. At the latter facility the Company manufactures reinforced thermoplastic injection molding compounds. Toxic chemicals are used in the manufacture of these products and employees from time to time have become ill from exposure to the chemicals.

The events herein arise from the Union's effort to organize the employees at the Company's two plants. In March 1973 the employees at Plant No. 1 were informed that their work schedule would be altered because the Company was changing from three 8-hour shifts to four 12-hour shifts. Because he believed that the employees' earnings would be substantially reduced by this change, following the meeting where the announcement was made, Darrell B. Grubb invited employees who were interested in union representation to meet at an inn located close to Plant No. 1. About 14 or 15 employees attended the initial meeting and also present at the invitation of Grubb was Union Representative Robert Ellsperman. At this meeting employees signed union authorization cards and a campaign to enlist employee support was begun. Subsequently, on May 16, 1973, the Union filed a petition for certification as representative and pursuant to a stipulation for certification upon consent election which was approved on June 29, 1973, an election was conducted on July 19 and 20, 1973, among the employees in both plants. The results were 73 ballots cast for the Union and 73 ballots cast against the Union and 1 ballot was challenged. Ultimately the challenge was overruled and the ballot was opened on December 19, 1973. The ballot was a vote against the Union. Thus, the Union lost the election by 74 votes to 73.

Grubb was not only instrumental in initiating the organizational drive but also was very active during the campaign. Among other things, he distributed authorization

cards to employees and passed out handbills at the Company's premises approximately eight times. On five of these occasions Grubb delivered handbills to Company President Dr. Kiyo Hattori. Grubb also acted as an observer for the Union during the election. Grubb's union sympathies and activities were well known to company management. During the preceding year he actively had supported an organizational drive conducted by the UAW. In that instance an election was held in June 1972 and Grubb served as the observer for the UAW.

The Company was opposed to the Union and conducted a vigorous campaign to defeat the Union in the election. Among other things, about a month before the election Personnel Manager Joan Murray interviewed the employees individually . According to Grubb's uncontradicted testimony, his meeting with Miss Murray took place in the office of General Foreman Richard Smallwood. "She wanted to know if I had any complaints and I explained to her [about] a few things that the company had promised us and reneged on and she said she didn't know about those things, that she wasn't there at that time. She thought we could work our problems out better without a Union. I told her that I didn't think so and that was the general line of conversation. Then she gave me a book of company procedures and such." This testimony does not support the allegation of the complaint that Joan Murray "solicited and offered to adjust grievances from its employees if they refrained from becoming or remaining members of the Union or giving any assistance or support to it, or in order to induce them to do so." As there is no other evidence in support of that allegation of the complaint I shall recommend its dismissal.

During her interviews with the employees Miss Murray handed to each a 52-page booklet entitled, "Employee Handbook." It describes the Company, its operations, em-

ployee benefits, rules governing employee conduct, and other subjects having to do with the relationship between the employees and the Company. No evidence was offered as to why the Company chose to distribute this handbook had been given to them in 1972 while another organizational campaign was in progress. However, the booklet reflects clearly the Company's hostility to the organization of its employees. On page 27, under the heading, "Company Belief," is written:

> We sincerely believe that the best interests of all employees will be served by operating this plant without a union. We believe that the interests of employees and management are the same and that a union tends to split them apart. We further believe that there will be much better employee relations, higher morale, and a friendlier working atmosphere without a union.

There is then printed under the hearing, "Advantages to the Employee by not having a Union," six numbered items. The next page is headed "Fiberfil Employees Enjoy the Best of Benefits—Without a Union." There follows eight numbered examples. After the examples is printed: "No one has to be a union member in order to work here and the law of the United States says that an employee has just as much right *not* to join a union as he or she does to join." On page 30 of the booklet is the heading, "Our Written Guarantee to You." In summary, the Company on that page promises the employees that it will be a considerate and beneficent employer and "You are not now, and never will be, forced to pay tribute to any outside organization in money, time, or loss of personal freedom, to enjoy these and the many other progressive benefits of Fiberfil."

A. *The Discharge of Darrell B. Grubb*

Except for a short layoff, Grubb worked for the Company as a machinist continuously from September 1967

until he was discharged on August 13, 1973. There is no contention that Grubb was an unsatisfactory employee and Respondent's asserted reason for his discharge is that he was absent from work on 3 consecutive days without calling in which violated an established rule of the Company that is automatically and uniformly applied.

Immediately following, the election which was held on July 19 and 20 where the vote was 73-73 with 1 challenged ballot, Grubb went on his scheduled vacation which ended on August 6. Grubb, whom I find was generally a truthful witness, testified that on August 6, 1973, at approximately 6:30 a.m., he telephoned the Company and informed his group leader, Ollie Jessie, that he was very sick, would not be in to work, and was going to the doctor. Jessie said that he would report Grubb's absence.[1] Grubb visited his physician, Dr. Chas. E. Moehlenkamp, who advised Grubb that he should return home, go to bed, and remain away from work until August 13. Dr. Moehlenkamp gave Grubb a written prescription form intended for delivery to the Company which states that Grubb was suffering from acute gastroenteritis and that he may return to work on August 13, 1973.

Grubb next telephoned the Company in the late afternoon on Sunday, August 12. He spoke to General Foreman Smallwood, informed Smallwood he was feeling better, was prepared to return to work the next morning, and wished to know his work schedule. Smallwood replied that

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[1] Jessie testified that Grubb telephoned about 8 a.m. on August 6 and said that he was sick, that he had to go to the doctor and "he wouldn't be in that day." Jessie replied that he would inform Foreman Smallwood. I believe that neither Jessie nor Grubb has such perfect memory that either recall the precise words used in their conversation. Contrary to the implication from Jessie's testimony, I find that Grubb did not tell Jesie that he expected to be absent only on the day he called, August 6, but informed Jessie that because of his illness he would not report for work and in the conversation did not indicate how long he would be absent.

he should report to the personnel office. The next morning Grubb telephoned Personnel Manager Joan Murray who told him that he had been terminated.

Production Superintendent Charles Mohle testified that on August 6 Foreman Smallwood informed him that Grubb had called in and had advised group leader Ollie Jessie that Grubb would not be in that day, he was sick and was going to the doctor. Grubb was absent on August 7. He was not scheduled to work on August 8 and 9. On August 10 Foreman Smallwood again advised Mohle that Grubb was not in and that this was the second day Grubb had missed work without calling. Mohle telephoned the Company's labor counsel, Herschel Phillips, who is located in Los Angeles. Mohle explained that the reason for the call to Phillips was that "we knew that Mr. Grubb was a leader of the Union activities and didn't want to break any rules trying to bend over backwards for the guy and wanted to make sure that things were done in the proper order, that we would . . . ask Mr. Phillips if we could go ahead and proceed in the normal course of our company policy."

At the time Mohle spoke with Philips there had been prepared an instrument headed "Warning Notice" which was dated August 10, 1973, and was directed to Darrell Grubb. The notice reads, "INFRACTION On this date (8/10/73) Darrel [sic] Grubb failed to report intended absence from work. This is the third such infraction in less than 1½ months. Darrell [sic] was informed by me on July 4, 1973, of his failure to report intended absence on July 1, 1973. Darrell [sic] was also absent on August 7, 1973, and failed to report. Any further violation of this policy cannot be tolerated and will result in termination." The notice is signed by Supervisor Richard E. Smallwood. According to Mohle, in his conversation with Phillips, "Mr. Phillips okayed the sending of this letter to inform Mr. Grubb that he had been absent on these days mentioned here and that any further violation would result in termina-

tion." Mohle also testified that Phillips had advised him not to terminate Grubb until after Grubb had been absent for 3 full working days without calling in.

Although Grubb's home is located no more than two blocks from the plant and although in the past there had been occasions when the Company sent someone to Grubb's home to ask him to do overtime work, Mohle testified that on August 10 he gave no consideration to delivering the warning notice to Grubb, but instead about 4 p.m. personally mailed the warning notice to Grubb from a branch post office which was located about 12 blocks from the plant. The letter was mailed special delivery, certified mail, return receipt requewsted, and in accordance with the instructions of the sender the mail carrier was required to deliver the letter only to the addressee. Grubb did not actually receive the letter until August 14, although on August 11 he found a notice on the knob of his door that there was a special delivery letter waiting for him at the post office.

On Saturday, August 11, Smallwood recommended to Mohle that Grubb should be terminated because that was the third consecutive day Grubb was absent without calling in. However, in compliance with the instructions from Phillips, the termination papers were not prepared until the next day, August 12. It is noted that the personnel status which reflects Grubb's discharge states, "Would not rehire due to absentee problems." Mohle testified that this disqualification for future employment was based only on the unreported absences of August 7, 10, 11, and 12 and not because of any history of absenteeism on the part of Grubb. It is noted that Grubb who had worked 6 years for the Company, was terminated without any effort being made to ascertain why he had not called in—assuming there was such requirement—after his call of August 6, or to ascertain whether there were any extenuating circumstances explaining his failure to call in and that for the single offense Grubb was declared ineligible for future employment with the Company.

The alleged rule which purportedly was applied to Grubb was a principal area of litigation in this case. The Company's manual for its management employees describes its abstentee policy, as follows:

> It is recognized that both planned and unplanned absences from work will occur and it is intended that each absence be given fair and equitable treatment.
>
> • • • •
>
> An employee who is unavoidably absent from work (unplanned) notify his supervisor on the first date of absence or earlier if possible, in order to be excused...
>
> • • • •
>
> An employee who is absent for three days without notifying his supervisor will be terminated. Exceptions may be granted only in unusual circumstances by the chief executive of the employee's organizational unit at the location.

In the late 1960s a handbook of 25 pages containing the Company's rules was distributed to employees. In relevant part, it provides: "If you know you will be absent on a certain day, give your supervisor as much advance notice as possible so plans can be made to cover your duties. An absence of three days without notifying the company is considered a resignation without notice."

This manual was superseded in 1972 by another employee handbook. The pertinent provisions regarding absences read as follows: "If you must be absent for good cause, tell your Foreman before your shift starts. If you are calling in, talk directly to your Foreman to explain the situations. Call in and report for each *shift* you must miss as long as you are off." [2]

The 1972 handbook was replaced in 1973 by a similar manual. With respect to the same subject the latter pro-

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[2] Respondent does not contend that there is any objection to reporting a contemplated absence to a lead operator.

vides: "If you must be absent for good cause, tell your Foreman before your shift starts .... If you are calling in, talk directly to your Foreman to explain the situation. Call in and report for each *shift* you must miss as long as you are off."

Neither the 1972 nor the 1973 employee handbooks call for the automatic termination of employees for 3 consecutive days of unreported absence. The earlier handbook, which was distributed in the 1960s, provides that an absence of 3 days without notifying the Company is considered a resignation without notice. A policy of this nature is not uncommon in industrial plants in order to remove from payroll the names of employees who have quit. However, that provision would not be applicable to Grubb who, before the first day of his absence, telephoned the Company and advised his group leader that he was going to be absent because of illness and was going to consult his physician. In the circumstances, a further absence of 3 days would not be considered as a quitting under the Company's rule as written in the earliest of its three employee handbooks.

As the written rules of the Company do not support the policy which is asserted as a defense to the discharge of Grubb, Respondent sought to prove that those rules have been expanded by custom and practice. Despite the changes reflected in the several employees' handbooks, Production Superintendent Mohle testified that the policy as to reporting absences was explained to him when he was hired in 1963 and has not changed in the more than 10 intervening years. Mohle and other management personnel were called as witnesses by Respondent and testified that they conduct orientation programs for new employees on an individual basis during which each employee is instructed regarding the Company's absentee rules.

Precisely what each employee may have been told varied depending upon which supervisor conducted the orientation session. Since the alleged rule was not read to the em-

ployees but was recited extemporaneously with at most the assistance of only sketchy notes, undoubtedly the description of the rule varied as it was articulated to different employees even when done by the same supervisor. Construing the supervisors' testimony most favorably to Respondent, employees were told that they must call in with respect to each day of absence, unless they inform the Company in advance how long they were going to remain away from work, and any employee who is absent for 3 or more consecutive days without at anytime calling in will be terminated. The rule as explicated by Respondent's witnesses does not provide that an employee who called in to report that he will be absent because of illness but without specifying the anticipated length of his absence will be terminated if he omits to call in during the succeeding 3 workdays.

Six employees called by General Counsel testified regarding their understanding of the absentee rule. Their testimony indicates varying understandings of the applicable rule. There is uniform agreement that an employee who is absent at least 3 consecutive days is required to bring a doctor's certificate with him when he returns to work. Also, their testimony indicates that they understand that when they are going to be absent because of illness they should notify the Company at the beginning of their absence, but there is no rquirement to notify the Company on each successive day of their absence, if they are hospitalized or under a physician's care.

Respondent offered into evidence personnel records relating to employees who were discharged for failing to notify the Company of their absences for at least 3 consecutive workdays and who were terminated. The circumstances of the various cases differ. However, they are consistent with a policy of treating unexplained absences which extend for at least 3 days as constituting voluntary quits. Production Superintendent Mohle testified that he

knows of no case, including those referred to in the exhibits offered in evidence in this proceeding, similar to Grubb's where an employee on the first day of his absence reported that he was sick and that he was about to consult a doctor and nevertheless was terminated when he later sought to return to work.

Upon consideration of all the evidence regarding the Company's absentee rule I find, contrary to Respondent, that there was in effect no rule, either in writing, or promulgated orally, or established by custom or practice, which automatically called for Grubb's discharge because of his failure to inform the Company on August 7, 10, and 11 that he would be absent because of illness when he had informed the Company on August 6 that he was ill and was going to consult his physician. I find the Company's asserted reason for Grubb's discharge is specious.[3]

The evidence regarding the attempt to warn Grubb about his impending infraction of the 3-day rule, is so contrived that, instead of lending credibility to the Company's defense, it bolsters General Counsel's assertion that the Company sought to use Grubb's absences from work in August 1973 to conceal its underlying unlawful motive for discharging him.

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[3] The August 10, 1973, warning notice to Grubb states, "Darrel [sic] was informed by me on July 4, 1973, of his failure to report intended absence of July 1, 1973." A memorandum assertedly given to Mohle by Foreman Smallwood on July 4, 1973, states, "I told Darrel [sic] Grubb he had to call in when he was off from work .... He had been off from work June 29, June 30, and July 1, 1973. He called the 29th & 30th of June. But not July 1, 1973." However, Smallwood testified that on July 4, "I told Darrel, I said '. . . I know you got a Doctor's statement, you are to call, you didn't call in yesterday.' " Thus, even on that occasion, accepting as true Smallwood's testimony, Smallwood did not articulate the supposed rule to Grubb that he would be subject to automatic discharge if he should be absent for 3 consecutive days without calling in regardless of whether he informs the company at the beginning of his absence period that he was ill.

The warning notice initially was prepared in longhand by Foreman Smallwood. He gave the instrument to Production Superintendent Mohle who caused it to be typed and who mailed it at 4 p.m. on August 10. According to Smallwood, the reason for the warning notice was to give Grubb an opportunity to call in before the expiration of 3 days and thereby avoid being discharged under the Company's rule. Mohle also testified that the purpose of the notice was to give Grubb an opportunity to correct his dereliction and avoid an infraction of the 3-day rule which would lead to his discharge. This was in line with Mohle's testimony that he was leaning over backwards to show consideration to Grubb. According to Mohle, he would have telephoned Grubb but was unable to do so because Grubb's number was unlisted. Mohle also testified that had he been able to telephone Grubb the written warning would have been unnecessary, and further that had he been advised by Grubb in such telephone conversation that Grubb was still ill that would have constituted adequate notice to the Company and Grubb then would not have been in violation of the 3-day rule. Mohle was unable to offer any explanation as to why the warning notice had not been delivered directly to Mohle's home which was located 10 blocks closer to the plant than the post office. As in the case of a telephone call, if the notice had been delivered to Grubb at his home Grubb would have been able to inform the messenger then and there as to his situation, whether he was too ill to return to work or whether he was quitting his employment. In that case too there would have been no reason for the application of the so-called 3-day rule.[4] Mohle testified that the reason the notice was sent to Grubb by certified mail was that "according to Mr. Herschel Phillips, we had to have some verification that we did attempt to let the man know that he was about to become terminated, because

[4] As it happened Grubb was not at home on August 10. However, as no attempt had been made to communicate with Grubb the Company did not know that it could not reach him at home.

of infraction of the rules." Mohle further testified that sending a warning notice such as was sent to Grubb was unusual.

It is the Company's position that Grubb was discharged by reason of the automatic application of its so-called 3 days' unreported absence rule. However, the Company was unable to prove that any such rule ever existed. It is not contained in the management manual nor in any of the three versions of the employee handbook. The attempted explication by various management personnel of a policy established, not in writing, but by oral communication to the employees was unsuccessful. None of Company's witnesses articulated a rule that covered Grubb's situation. Also, the understanding that the various employees called as witnesses by General Counsel had of the Company's absentee rule was substantially at variance with Respondent's contentions here. Moreover, Mohle testified that so far as he knows there never was a case such as Grubb's where an employee informed the Company that he was ill, that he was visiting the doctor and more than 3 days later when he sought to return to work was advised that he had been terminated. Finally, the elaborate and useless effort by the Company to send a warning to Grubb, which itself was an admittedly unusual procedure, tends further to indicate that the Company believed it necessary to erect some facade that might lend an appearance of reasonableness to the peremptory discharge of an employee with 6 years of continuous service. Contrary to Respondent, I find that Grubb was discharged not for the reason asserted by Respondent, but because of his activities on behalf of the Union.[5] Such discriminatory discharge dis-

[5] As of the time Grubb was discharged the results of the July 1973 election had not yet been determined. The vote was 73 to 73 and the outcome of the election depended on the resolution of a challenged ballot. In the circumstances, the Company's desire to get rid of Grubb probably was equally strong whether or not the election would be won by the Union. In the first instance,

courages membership in the Union and therefore constitutes a violation of Section 8(a)(3) of the Act. Furthermore, such discharge coerces, restrains, and interferes with employees' rights to engage in self-organizational activities and other concerted activities guaranteed in Section 7 and thereby violates Section 8(a)(1) of the Act.

B. Other Alleged Violations

William R. Temme testified that in mid-April 1973 Foreman Smallwood in the presence of Shift Foreman George William Jones offered Temme the opportunity to try out as a lead operator "as long as [Temme] wasn't involved in a union." Both Smallwood and Jones denied that any such incriminatory remark was made. I credit these denials and find that General Counsel has not proved a violation of the Act by reason of anything said to Temme or done at the time he was given a chance to try out for lead operator or by reason of the fact that ultimately he was not selected for the position.

Darrell Grubb testified that in June 1973 he initiated a conversation with Personnel Manager Peak, who was the predecessor of Joan Murray, about the Union's campaign. According to Grubb, in that conversation Peak said that if the Union comes in and the Company can no longer be

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Grubb's discharge would reflect the Company's desire to retaliate against him for instigating and supporting the Union campaign, and in the latter instance, in addition to the same desire, there would be the hope that by terminating him the Company would avoid a repetition of a third organizational campaign. The discharge of the leader in the union movement is a powerful means of combating employee organization because a threat then hangs over the remaining employees that if they support a union they also would be subject to peremptory removal from their jobs. Such threat is a forceful constraint on the exercise by employees of their statutory rights to engage in self-organizational activities. The fears generated in employees by the discharge of coworkers are pervasive, difficult to extinguish, and quick to reappear under only slight stimulus.

competitive it will have to shut down. All too often only a fine line separates an unlawful threat from permissible prophecy. In the circumstances here, where the conversation was initiated by Grubb, where it was of a friendly nature, and where the Company is not accused of making any other threats to shut down its plant or to engage in other reprisals against employees for their union activities, I find that Peak's remark to Grubb was not coercive. *B. F. Goodrich Footwear Company,* 201 NLRB No. 46; *Birdsall Construction Company,* 198 NLRB No. 20.

The final incident occurred at the Northbrook plant about 5:30 p.m., on July 10. James E. Wood, an employee of Plant No. 1, entered upon its parking lot to handbill employees and to talk to employees about the Union. According to Wood, Plant Manager Ted Davis came to him and informed him that he was not allowed to handbill on company property. Wood then left and went to the entrance of the property where he continued handbilling. Davis testified that he merely was enforcing a rule which prohibits off-duty employees from entering upon company premises. In accordance with the Board's holding in *GTE Lenkurt, Incorporated,* 204 NLRB No. 75, I find that the foregoing incident does not constitute a violation of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Company set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it cease and desist

therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully discharged its employee, Darrell B. Grubb, on August 13, 1973, I shall recommend that Respondent offer him immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him by payment to him of a sum of money equal to that which he normally would have earned from the aforesaid date of his termination to the date of Respondent's offer of reinstatement, less his net earnings during such period. The backpay provided for herein shall be computed on the basis of calendar quarters, in accordance with the method prescribed in *F. W. Woolworth Company*, 90 NLRB 289. Interest at the rate of 6 percent per annum shall be added to such net backpay and shall be computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Respondent's unlawful discharge of Darrell B. Grubb goes to the very heart of the Act and indicates a purpose to defeat self-organization of employees. The unfair labor practices committed by Respondent are potentially related to other unfair labor practices proscribed by the Act, and the danger of their commission in the future is to be anticipated from Respondent's conduct in the past. The preventive purpose of the Act will be thwarted unless the recommended Order herein is coextensive with the threat. Accordingly, in order to make effective the interdependent guarantees of Section 7 and thus effectuate the policies of the Act, an order requiring Respondent to cease and desist from in any manner infringing upon the rights of employees guaranteed in the Act is deemed necessary. *N.L.R.B.* v. *Express Publishing Company*, 312 U.S. 426; *N.L.R.B.* v. *Entwistle Mfg. Co.*, 120 F.2d 532 (C.A. 4).

Upon the basis of the foregoing findings of fact and upon the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. By discriminatorily discharging Darrell B. Grubb on August 13, 1973, thereby discouraging membership in the Union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

2. By reason of the foregoing conduct Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act and thereby has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[6]

ORDER

Respondent, Fiberfil, Division of Dart Industries, Evansville, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees in regard to their hire, tenure of employment, or

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[6] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein, shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

other terms or conditions of their employment in order to discourage membership in District 153 of the International Association of Machinists and Aerospace Workers, AFL-CIO, or any other labor organization.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer Darrell B. Grubb immediate and full reinstatement to his former job or, if the job no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges.

(b) Make Darrell B. Grubb whole for any loss of earnings he may have suffered by reason of Respondent's unlawful discrimination against him in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(d) Post at its place of business in Evansville, Indiana, 'copies of the attached notice marked "Appendix."[7] Copies of said notice on forms provided by the Regional Director for Region 25, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt

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[7] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS ALSO ORDERED that the allegations in the complaint of violations of Section 8(a)(1) and (3) be dismissed except insofar as specific findings of violations of those sections have been made above.

Dated at Washington, D.C. February 5, 1974.

/s/ HERBERT SILBERMAN

Herbert Silberman
Administrative Law Judge

GTE LENKURT, INCORPORATED and BARBARA L. GEICHER and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO and ROSE MARIE QUINTANA.

Cases 28-CA-2495, 28-CA-2506, 28-CA-2613, and 28-CA-2670-2

July 11, 1973

On November 22, 1972, Administrative Law Judge Jerrold H. Shapiro issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and an answering brief, and Respondent filed a reply brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs [1] and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order,[3] except as modified herein.

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[1] As the record, exceptions, and briefs adequately present the issues and the positions of the parties, Respondent's request for oral argument is hereby denied.

[2] Respondent and the General Counsel have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3, 1941). We have carefully examined the record and find no basis for reversing his findings.

[3] Chairman Miller concurs in the finding that the communication to employees of Respondent's instructions to its supervisors to report the names of prounion employees was violative of Sec. 8(a)(1). However, in adopting this finding, Chairman Miller does not rely on the general principle set forth in *Cannon Electric Company*, 151 NLRB 1465, with which Chairman Miller disagrees. He would therefore not adopt the broader findings or conclusions of the Administrative Law Judge in this connection and would limit his holding to the communication to employees of the instructions to the supervisors.

As fully described in the Administrative Law Judge's Decision, in August 1971, prior to the advent of the Union's organizing campaign, Respondent promulgated a number of work rules which, if violated, could result in a disciplinary action. These rules were set forth in an employee handbook, which was distributed to all employees. One of these rules, designated by the Administrative Law Judge as rule D, reads, "An employee is not to enter the plant or remain on the premises unless he is on duty or scheduled for work."

The Administrative Law Judge found that Respondent had shown no justification for prohibiting off-duty employees from returning to, or remaining on, the premises during their nonworking hours to solicit union support or to distribute union literature in nonworking areas. Accordingly, he concluded that rule D, insofar as it contained such a prohibition, was violative of Section 8(a)(1) of the Act. We do not agree.

Rule D, unlike some of Respondent's other rules,[4] does not mention employee solicitation or distribution. Rather, it prohibits off-duty employees from entering or remaining on the premises for *any* purpose. There is no evidence that off-duty employees have, in fact, been allowed on the premises for purposes other than union solicitation or distribution of union literature, and hence there is no indication it has been disparately applied. This case thus differs from those in which no-solicitation or no-distribution rules, either

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[4] We affirm the Administrative Law Judge's finding that rule C, which prohibits solicitation by employees on plant premises during nonworking time, is violative of Sec. 8(a)(1) of the Act. We likewise affirm his finding that Respondent violated Sec. 8(a)(1) by promulgating maintaining, and enforcing an unwritten rule prohibiting employee distribution of literature in the parking lot during nonworking time. As this rule was applied to employees lawfully on Respondent's premises, and as there is no showing that the rule was necessary to maintain safety, discipline, or production, it was unlawful irrespective of the availability of other means of communication.

on their face or as applied, limited the activities of employees lawfully on the premises.

Under well-settled principles applicable to employee activities—principles which we are applying in this very case [5] —an employer may not, absent special circumstances, prohibit employees lawfully on the premises from engaging in union solicitation on their own time. However, it is also well settled that nonemployees are not entitled to enter an employer's premises to engage in union activity there.[6] Accordingly, to dispose of the issue here, we must determine which of these principles applies to an off-duty employee, i.e., whether, notwithstanding an employer rule to the contrary, he has a right to enter or remain on an employer's premises if he wishes to do so for this purpose.

In our view he does not, for his status is more nearly analogous to that of a nonemployee, and he is subject to the principles applicable to nonemployees. This is so because the interests to be balanced in determining the validity of such a rule are very different as between an employee on the premises in connection with his work and an off-duty employee who seeks to enter. The former involves a balancing of statutory rights of self-organization against the employer's interests in production, safety, or discipline, and in this situation the statutory rights prevail (unless it can be shown that interference with those rights is essential) because an employer may not close off this normal channel of communication among the workers without proper justification.[7] The latter situation, however, requires a balancing of the employees' Section 7 rights against the employer's private property rights.[8]

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[5] See fn. 4, *supra*.

[6] *N.L.R.B.* v. *The Babcock & Wilcox Company*, 351 U.S. 105, 113.

[7] *N.L.R.B.* v. *The Babcock & Wilcox Company*, *supra* at 112; *Republic Aviation Corporation* v. *N.L.R.B.*, 324 U.S., 793, 804.

[8] See *Diamond Shamrock Co.* v. *N.L.R.B.*, 443 F.2d 52 (CA. 3, 1971).

It seems apparent that for purposes not protected by this Act off-duty employees and nonemployees would be invitees to the same extent, and one is no more entitled than the other to admission to the premises. We are unable to conclude that a different rule is required where union organization is involved, and, absent a showing of inability to reach the employees otherwise, we see no justification for holding that an employer's right to control ingress to his property must give way for that purpose. Rather, to require an employer to open his premises for union activities to off-duty employees is in fact, to compel him to make available an additional means of communication, one which we believe he need not afford them. For, in our view, there is no significant diminution of the employee rights by such a no-access rule, inasmuch as the Board and courts protect the right to engage in union activities during the normal period of employee association and communication; i.e., during nonwork periods when employees are on the premises in connection with their jobs.

In view of the above, we find that the balance between the competing interests in this situations is properly struck by holding that, where an employer's no-access rule is nondiscriminatory, i.e., it denies off-duty employees access to the premises for any purpose and is not disparately applied against union activities, it is presumptively valid absent a showing that no adequate alternative means of communication are available.[9] As there is no such showing here, and no evidence that rule D was discriminatorily enforced, we conclude that Respondent did not violate the Act by promulgating or maintaining this rule. Accordingly, we shall dismiss this aspect of the complaint.

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[9] Prior cases, particularly *McDonnell Douglas Corporation*, 194 NLRB 514, are distinguishable on their facts. However, to the extent *McDonnell Douglas Corporation, supra*, remanded 472 F.2d 539 (C.A. 8), and *Diamond Shamrock Co.*, 181 NLRB 261, enforcement denied 443 F.2d 52 (C.A. 3), are inconsistent with the holding herein, they are hereby overruled.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified herein, and hereby orders that the Respondent, GTE Lenkurt, Incorporated, Albuquerque, New Mexico, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete paragraph 1(m) and renumber paragraph 1(n) as 1(m).

2. Substitute the attached notice for the Administrative Law Judge's notice.

IT IS FURTHER ORDERED that the complaint herein be and it hereby is, dismissed insofar as it alleges unfair labor practices not found herein.

MEMBERS FANNING AND JENKINS, concurring in part and dissenting in part:

We agree with our colleagues to the extent that they affirm the Administrative Law Judge's findings as to Respondent's 8(a)(1) and 8(a)(3) conduct. However for reasons given below, we disagree with their reversal of his findings that Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining rule D which totally prohibits off-duty employees from entering or remaining on any portion of Respondent's premises.

The Administrative Law Judge correctly reasoned as follows in holding the rule to be unlawful:

It is well settled that the Act guarantees an employee the right to solicit union support during nonwork time while on his employer's premises. It also guarantees an employee the right to distribute union literature in the nonwork areas of the employer's premises. An employer's

promulgation or maintenance of a rule which interferes with the exercise of protected employee rights is presumptively an unreasonable impediment to such rights and therefore comes within the proscription of Section 8(a)(1) of the Act.

Rule D in substance denies access to the plant to off-duty employees and prohibits employees going off-duty from remaining on the premises. While this rule does not contain a specific ban on union solicitation or distribution, its maintenance has the effect of forbidding employees on Respondent's three shifts to engage in such activity in nonwork areas at any time except during their own "breaks" and immediately before and after their own shifts.

The solicitation rights of both off-duty and on-duty employees are equally affected by the considerations which underlie the presumptive invalidity of no-solicitation rules; namely, (1) "time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property";[10] (2) the plant and its premises are normally the only places where all employees congregate and may afford the only practicable opportunity for discussing self-organization; and (3) solicitation in nonworking time and places could not normally affect safety and production. The presumption was not overcome in the instant proceeding as Respondent neither claimed nor proved any legitimate justification for its broad nonaccess rule.

While our colleagues appear to subscribe to the foregoing well-established principles insofar as they apply to on-duty employees, they depart therefrom in holding

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[10] *Republic Aviation* v. *N.L.R.B. supra.* See also *N.L.R.B.* v. *Babcock & Wilcox, supra,* and other cases cited by the Administrative Law Judge.

that off-duty employees are "more nearly analogous" to nonemployees. By arbitrarily finding that off-duty employees "are subject to the principles applicable to nonemployees," they fall into the error of concluding that off-duty employees have no greater rights than nonemployees, thus completely obliterating any distinction in their status under the Act. Our colleagues furnish no factual basis for their unwarranted and unrealistic conversion of off-duty employees to nonemployees. Nor do they invoke any statutory or judicial sanction for so doing.

In *N.L.R.B.* v *Babcock & Wilcox, supra,* the Supreme Court, reiterating its earlier decision in *N.L.R.B.* v. *Republic Aviation, supra,* held that "No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline." In view of this guiding principle enunciated by the Supreme Court and followed in a recent decision of the Board,[11] it is clear that off-duty employees who wish to remain on the premises or enter the plant for purposes of solicitation or distribution of union literature may do so subject to the employer's need to maintain production, discipline, or security.[12]

Our colleagues fail to take cognizance of the Supreme Court's affirmation of long-established principles by endorsing a sweeping nonaccess rule which runs afoul of the Act because it thwarts the right of employees on the

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[11] See *Westinghouse Electric Corporation, Tampa Division,* 199 NLRB No. 101, wherein the Board found unlawful a broad nonaccess rule which precluded off-duty employees from ever distributing union literature on any part of the employer's property.

[12] The Administrative Law Judge in paragraph 1(m) of his recommended cease-and-desist order properly stated that any limitations imposed by Respondent must be "clearly defined as to times and areas" and must be "demonstrably necessary to maintain productions, discipline, or scrutiny."

three shifts to communicate with each other on their Employer's premises during their nonworking time for the purpose of discussing self-organization among themselves. The most serious defect of this rule, which is destructive of the employees' protected right to promote self-organization, is that it compartmentalizes the employees in each shift and completely isolates them from their fellow employees on other shifts. The rule also possesses a further legally undesirable shortcoming in that it renders difficult, if not impossible, any discussion before or after work between employees on a particular shift as the rule appears to limit the employees' presence at the plant and premises to the brief time necessary to prepare for or leave work.

In view of the foregoing, we would affirm the Administrative Law Judge's finding that rule D violates Section 8(a)(1) of the Act. We would also adopt his cease-and-desist order pertaining thereto as it affords adequate safeguards whereby Respondent may impose limitations which are "clearly defined as to times and areas and are demonstrably necessary to maintain production, discipline, or security."

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-343

DISTRICT 153 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

This case presents the question of the right of an employer to enforce its rule forbidding off-duty employees from coming onto its premises against an employee who, in connection with a union election campaign, seeks to distribute union literature and to talk to employees on the parking lot of a company plant some 4 1/2 miles away from the plant where he works (Pet. App. 19a, 33a). The Board, adopting the opinion of its Law Judge, followed *GTE Lenkurt, Inc.*, 204 NLRB 921, and held that enforcement of the company rule did not violate Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) (Pet. App. 4a-37a; see 33a). In *GTE Lenkurt*, the Board had found that the status of an off-duty employee is more nearly analogous to that of a non-employee than it is to that

of an on-duty employee,[1] and concluded that union solicitation by an off-duty employee was governed by *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105, which held that non-employees may lawfully be barred from entering an employer's premises to engage in union activity unless it is shown that no adequate alternative means of communication are available. Accord: *Central Hardware Co.* v. *National Labor Relations Board*, 407 U.S. 539.[2] Cf. *Bulova Watch Co.*, 208 NLRB 798 (distinguishing *GTE Lenkurt* "because that case involved admission to the plant itself and did not involve employee access to outside areas of the premises").

The court of appeals affirmed the Board's decision in an unpublished order without opinion (Pet. App. 1a).[3] Rehearing *en banc* was denied (Pet. App. 3a).

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[1]In *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, the Court held that an employer may not prohibit employees lawfully on the premises from engaging in union solicitation on their own time unless it is shown that the restriction is necessary to maintain production or discipline.

[2]As pointed out in the Board's brief (pp. 13-15) in *Hudgens* v. *National Labor Relations Board*, No. 74-773, argued October 14, 1975, different principles govern the right of employees to engage in consumer picketing on property which has assumed "to some significant degree the functional attributes of public property devoted to public use." *Central Hardware Co.*, *supra*, 407 U.S. at 547. (A copy of the *Hudgens* brief has been served on petitioner.)

[3]Local Rule 8(b) of the Rules of the District of Columbia Circuit provides in pertinent part:

> Unpublished orders including explanatory memoranda of this Court are not to be cited in briefs or memoranda of counsel as precedent. However, counsel may refer to such orders, and memoranda, for such purposes as application of doctrines of res judicata, collateral estoppel, and law of the case, which turn on the binding effect of the judgment, and not on its quality as precedent.

1. The question whether, in striking the balance between employee organizational rights and employer property rights on purely private property, off-duty employees should be treated like on-duty employees or like non-employees is one which Congress has entrusted primarily to the Board to answer. See *National Labor Relations Board* v. *Magnavox Co.*, 415 U.S. 322, 326. The Board's conclusion that employees, while off duty, should be governed by the principles applicable to non-employees as to access to the premises for distribution of literature is not unreasonable and therefore the court below properly declined to disturb it.

An employer invites on-duty employees onto his property to work and, having done so, he cannot deny them the use of that property for organizational purposes where there is no showing that such use would interfere with production or discipline. Non-employees ordinarily have no permission to enter onto the employer's property, but may nonetheless do so if there is no other way for them to have access to the employees for union solicitation. Accordingly, the Board reasonably concluded that, as in the case of non-employees, the employer's property rights are entitled to greater weight, when weighed against the off-duty employee's right of access to the premises for organizational purposes, than when weighed against the rights of employees who are on the premises for work.

2. The conflict of decisions among the circuits, cited by petitioner (Pet. 13-14), has not matured to the point where it warrants resolution by this Court. The *per curiam* order entered by the court below has no precedential value (n. 3, *supra*), and hence would not preclude a *de novo* consideration of the issue in the District of Columbia Circuit. Moreover, while the Third

Circuit has recognized a distinction between off-duty employees and on-duty employees,[4] and the Fifth Circuit has declined to do so,[5] it is not clear that the Fifth Circuit would accord off-duty employees the same access rights as on-duty employees in a situation where, as here, they seek access to company property located some distance from their normal workplace. See *National Labor Relations Board* v. *Great Atlantic & Pacific Tea Co.*, 277 F.2d 759, 762-764 (C.A. 5) (employer lawfully barred off-duty employees of one of its retail stores from engaging in union solicitation in the non-public area of another of its stores). There is thus no conflict among the circuits on the factual situation presented by this case.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN C. MILLER,
Acting General Counsel,
National Labor Relations Board.

NOVEMBER 1975.

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[4] *Diamond Shamrock Co.* v. *National Labor Relations Board*, 443 F. 2d 52. However, in that case, the court emphasized that the off-duty employees were not barred from union solicitation "on all company premises outside the fence," but only "from returning to or remaining on the plant premises *inside* the fence after working hours" (*id.* at 56).

[5] *Republic Aluminum Co.* v. *National Labor Relations Board*, 394 F. 2d 405; *National Labor Relations Board* v. *Litho Press of San Antonio*, 512 F. 2d 73, 76.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-343

DISTRICT 153 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD AND FIBERFIL DIVISION OF DART INDUSTRIES, INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO MEMORANDUM IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

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DISTRICT 153 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

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REPLY TO MEMORANDUM IN OPPOSITION

The Opposition tacitly concedes the conflict with the Fifth Circuit.* But it ignores the conflict with this Court's declaration of the law in *NLRB* v. *Magnavox Co.*, 415 U.S. 322, 325 (1974), almost a year after *Len-*

* It takes no notice of our demonstration that the single feature it grasps as distinguishing—that Woods was soliciting fellow employees at another plant of his employer (Op. pp. 1, 4, cf. Pet. pp. 3, 4-5)—is, and was treated below as, irrelevant because both plants are part of the same bargaining unit and are factories, not retail stores (Pet. p. 9, n. 7).

kurt, which the Board nevertheless followed without comment in this case (Pet. p. 5).

In *Magnovox* this Court said (*id.*)

> "The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees. *So long as the distribution is by employees to employees and so long as the in-plant solicitation is on nonworking time, banning of that solicitation might seriously dilute § 7 rights.* For Congress declared in § 1 of the Act that it was the policy of the United States to protect 'the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing.' " (Emphasis added.)

In context, the italicized formulation leaves no room for an additional exception—"and so long as the soliciting employees are not off duty."

While the Opposition asserts (p. 3) that the conflict "has not matured to the point where it warrants resolution by this Court," it does not dispute our demonstration (Pet. p. 12), that unless certiorari is granted *in this case,* this Court's view of the law will not even have a chance to prevail.

Respectfully submitted,

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